IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 926

BETHLEHEM STEEL COMPANY, ET AL., *Petitioners*,

v.

UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

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PETITIONER'S REPLY BRIEF

The respondent's memorandum is as notable for what it does not do as for what it does.

1. Respondent does not quarrel and is not "dissatisfied with [the] presentation" by petitioner of the question presented. Pet. 2; see Rules 40(3) and 24(1). The essence of the question presented is that "the midbodies met all factual, statutory, and established judicial tests as to what constitutes a vessel." Pet. 2.

We are not here dealing with respondent's imagined "large wooden watertight packing crate" (Resp. Memo. 5) any more than we are with the wooden shoe in which Wynken, Blynken, and Nod sailed (see Eugene Field, *A Dutch Lullaby*), but with large (500 feet long), ocean-going vessels, having cargo capacity of over 12,000 tons, carrying and housing crews of eight. Pet. 4-5. Indeed, we are dealing with vessels within what respondent calls "the traditional meaning of the word" (Resp. Memo. 5), and in the same sense that "The dredge and scows in *The International* [89 Fed. 484 (C.A. 3)] and the yachts in *Thornley & Pitt* [18 C.C.P.A. (Customs) 265] were plainly vessels." Resp. Memo. 5.

2. In saying that it was correct for the court below to hold the midbodies subject to duty because it was petitioners' design and intention to use them, after arrival in this country, as mid-sections of ore carriers, respondent has not met, or even attempted to meet, the argument of the petition (Pet. 8) that looking to the future, as the court below did, to determine whether something brought into this country is subject to customs duty directly conflicts with the rule of the decided cases that *the tariff status of an article is governed by its condition at the time of arrival in the United States,* not by what might be done with the article after arrival. *United States* v. *Schoverling,* 146 U.S. 76; *Worthington* v. *Robbins,* 139 U.S. 337; *Leonard Levin Co.* v. *United States,* 27 C.C.P.A. 101, 105 C.A.D. 69; *The Altenburg,* 21 Treas. Dec. 275, T.D. 31898 (Bd. of Genl. Appraisers, 1911).

3. Respondent refers (Memo. 2, 7) to a ruling of the Bureau of Customs, made in its capacity as administrator of the cabotage laws, that the rebuilt tank-

ers were eligible to engage in domestic trade, in the course of which the Bureau said that a midbody is not a vessel. This ruling, pertaining solely to a documentation matter, is not before the Court, nor was it before the court below, or before the Customs Court. In any event, the question of documentation, or lack of it, is irrelevant to whether a floating structure is a vessel (*Hercules Co.* v. *The Brigadier General Absolom Baird,* 214 F. 2d 66 (C.A. 3); *Scudero* v. *Todd Shipyards Corp.,* 63 Wash. 2d 46, 385 P.2d 551) or is subject to customs duty. *United States* v. *Porto Rico Coal Co.,* 17 C.C.P.A. (Customs) 288.

If the thrust of respondent's argument is that petitioners are being inconsistent (it was one of the petitioners who sought the documentation ruling), petitioners would point out that there is no such inconsistency as the petitioner's ruling request did not seek a determination of whether the midbody was a vessel. On the contrary, it is the Government that has been inconsistent. Here the Government claims midbodies are not vessels, but in *United States* v. *Tug Parris Island,* 215 F. Supp. 144 (E.D.N.C.), the United States brought an action in admiralty against a T-2 tanker midbody for damage it had inflicted while under tow in collision with the Coast Guard cutter Chilula, and in opposing a motion to dismiss the libel *in rem* against the midbody, the Government's memorandum argued:

> "The gravamen of the Government's action is that the Chilula was * * * struck by a moving vessel [*i.e., the midbody*], which is *prima facie* at fault. * * * The tanker section [*the midbody*] as the instrument of the collision, the only vessel which came in contact with the Coast Guard Chilula, is under a burden to show that she is free of fault * * *."

An even more glaring instance of the Government's inconsistency is found in *In Re United States Air Force Texas Tower No. 4*, 203 F. Supp. 215 (S.D.N.Y.). The Texas Tower was a large radar tower installation off the North Atlantic Coast of the United States that stood in 185 feet of water on three steel legs, each of which was 12½ feet in diameter and was permanently embedded in the ocean floor by means of solid concrete caissons 25 feet wide and 20 feet deep. Following collapse of the Tower in a North Atlantic storm, resulting in the death of 28 persons, the Government petitioned the court for limitation of liability, under 46 U.S.C. 183 (R.S. § 4283, as amended), on the ground that the Tower was a vessel. Now, to avoid a refund of customs duties, the Government claims that midbodies that cross the Atlantic on their own bottoms with their own crews and are fully capable of carrying substantial commercial cargo are not vessels.

4. Respondent asserts (Memo. 7-8) that the question presented "has little prospective importance" and that petitioners are "unrealistic" in indicating (Pet. 14) that there is a continuing interest in bringing foreign-built midbodies to the United States. Respondent's assertions are wholly unfounded in fact. The facts are that United States ships rebuilt in the United States with foreign midbodies have been ruled to be eligible to share in the carriage of the 50 per cent of government-financed cargoes reserved to privately owned United States-flag commercial vessels, in accordance with 46 U.S.C. 1241(b) (section 901(b) of the Merchant Marine Act, 1936, as amended by Act of Sept. 21, 1961, Pub. L. 87-266, 75 Stat. 565). Indeed, when the 1961 amendment to the Merchant Marine Act, 1936, was before Congress, the Department of Commerce

recommended favorable consideration and stated its interpretation of the bill to be that "any ship that is rebuilt in the United States with a foreign built midbody" would not be excluded from the definition of eligible privately owned United States-flag commercial vessels. H. Rept. 922, 87th Cong., 1st sess., p. 4. Moreover, such ships are also eligible to carry military cargo in accordance with 10 U.S.C. 2631 (Act of Aug. 10, 1956, c. 1041, 70A Stat. 146). And midbodies are still being brought to our shores for these purposes. See, e.g., Hearings, Subcommittee on Merchant Marine, House Committee on Merchant Marine and Fisheries, 89th Cong., 2d sess., June 20, 1966, p. 54. The importance of this to the life and health of the shipping industry should not be underestimated.

For the foregoing reasons and those stated in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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